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IN THE

Supreme Court of the United States

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, AND HOWARD MCDOUGALL, TRUSTEE,
Petitioners,

v.

BASIC AMERICAN INDUSTRIES INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the doctrine of anticipatory repudiation apply to change the accrual date for a cause of action for interim withdrawal liability payments under Section 4219(c)(5) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1399(c)(5)?

2. Assuming *arguendo* that the doctrine of anticipatory repudiation applies, does the mere cessation of operations in bankruptcy by the contributing entity constitute an anticipatory repudiation where other solvent controlled group members are jointly and severally liable for the interim withdrawal liability payments?

PARTIES TO THE PROCEEDINGS

Petitioners

Petitioner Central States, Southeast and Southwest Areas Pension Fund is a multiemployer employee benefit plan and trust and has no corporate affiliations. Petitioner Howard McDougall is one of the Trustees of the Central States, Southeast and Southwest Areas Pension Fund and has no corporate affiliations.

Respondents

Respondents are Basic American Industries, Inc., Jackson's Realty & Builders Company, Inc., C & B Wood Suppliers, Inc., E & F Realty Co., Waterfront Development Co., Inc., EFB Development Co., Inc., Turtle Creek Investment Co., Liquid Oil Growers Organization, Inc., Southwest Agri-Development Specialists, Inc., EFB Development Company, Sanibel Development Company, Sanibel Investment Company, Turtle Creek of Tennessee, Hato Rey Professional Arts, Inc., Turtle Creek North Apartments of Frankfort, Turtle Creek Apartments of Connersville, Turtle Creek Apartments of Marion, Toxbury Square, Ltd., Turtle Creek of Indiana, EFB Development Company, Sanibel Investment Co., Wheel Estates, EFB Coal Company, Inc., Horn AG Services, Inc., Table Fresh Grapes, Inc., Arizona Desert Growers, Desert Vineyards, Inc., Red Mountain Products, and The Racquets IV Tennis Club, Inc.

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OPINIONS BELOW

The June 5, 2001, opinion of the United States Court of Appeals for the Seventh Circuit is reported at *Central States, S.E. & S.W. Areas Pension Fund v. Basic Am. Indus., Inc.*, 252 F.3d 911 (7th Cir. 2001), and is set forth in Appendix hereto (App. A at 1a-12a).

The February 27, 1998, Order dismissing the original appeal entered by the United States Court of Appeals for the Seventh Circuit is unreported and is set forth in Appendix B hereto (App. B at 13a-14a).

The October 18, 2000, Memorandum and Order dismissing the case entered by the United States District Court for the Northern District of Illinois is unreported and is set forth in Appendix C hereto (App. C at 15a-28a).

The July 3, 2001, Order denying rehearing and rehearing *en banc* entered by the United States Court of Appeals for the Seventh Circuit is unreported and is set forth in Appendix D hereto (App. D at 29a).

The September 30, 1997, Minute Order dismissing the case entered by the United States District Court for the Northern District of Illinois is unreported and is set forth in Appendix E hereto (App. E at 30a-31a).

BASIS FOR JURISDICTION

On June 5, 2001, the Judgment of the United States Court of Appeals for the Seventh Circuit was entered. On July 3, 2001, the United States Court of Appeals for the Seventh Circuit entered an order denying rehearing and rehearing *en banc*. This petition for writ of certiorari is filed within 90 days of the denial of rehearing. 28 U.S.C. § 2101(c).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 4001(b)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended by the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"), 29 U.S.C. § 1301(b)(1), provides:

> An individual who owns the entire interest in an unincorporated trade or business is treated as his own employer, and a partnership is treated as the employer of each partner who is an employee within the meaning of section 401(c)(1) of Title 26. For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single

employer. The regulations prescribed under the preceding sentence shall be consistent and coextensive with regulations prescribed for similar purposes by the Secretary of the treasury under section 414(c) of Title 26.

Section 4219(c)(5) of ERISA as amended by MPPAA, 29 U.S.C. § 1399(c)(5), provides:

> (5) In the event of a default, a plan sponsor may require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "default" means—
>
> (A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and
>
> (B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

Section 4301(f) of ERISA as amended by MPPAA, 29 U.S.C. § 1451(f), provides:

> (f) Time limitations
>
> An action under this section may not be brought after the later of—
>
> (1) 6 years after the date on which the cause of action arose, or
>
> (2) 3 years after the earliest date on which the plaintiff acquired or should have acquired actual knowledge of the existence of such cause of action; except that in the case of fraud or concealment, such action may be brought not later than 6 years after the date of discovery of the existence of such cause of action.

STATEMENT OF THE CASE

Allied Companies, Inc. ("Allied") entered into various collective bargaining agreements with various local unions affiliated with the International Brotherhood of Teamsters under which Allied had an obligation to contribute pension contributions on behalf of certain of its employees to Petitioner Central States, Southeast and Southwest Areas Pension Fund ("Central States"). Central States is a multiemployer pension plan within the meaning of sections 3(37) and 4001(a)(3) of ERISA, 29 U.S.C. §§ 1002(37) and 1301(a)(3). In 1989, Allied filed for bankruptcy protection under Chapter 11. On or about June 2, 1990, Allied ceased covered operations. As a result, Allied and all trades or businesses under common control with it (the "Allied Controlled Group") effected a complete withdrawal from Central States as defined by Section 4201(b) of ERISA, as amended by MPPAA, 29 U.S.C. § 1381(b). Consequently, all members of the Allied Controlled Group were jointly and severally liable for withdrawal liability to Central States in the amount of $751,918.80.

On or about June 22, 1990, the Allied Controlled Group received a notice and demand for payment of the withdrawal liability issued by Central States in accordance with Sections 4202(2) and 4219(b)(1) of ERISA, 29 U.S.C. §§ 1382(2) and 1399(b)(1). Pursuant to the notice and demand, the first payment in the amount of $59,524.30 was due on August 1, 1990. A total of 13.87 payments were to have been made with each payment due on the first of the month. Central States also filed two proofs of claim with respect to Allied in the bankruptcy proceeding. Both of the proofs of claim listed August 1, 1990, as the due date for the first payment of $59,524.30 and included a payment schedule of 13.87 payments.

Petitioners (Plaintiffs and Appellants below) Central States and Howard McDougall, trustee, filed the Complaint on

July 31, 1996, seeking to collect withdrawal liability under ERISA as amended by MPPAA from certain of the Respondents (Defendants and Appellees below) namely, Basic American Industries, Inc., Jackson's Realty & Builders Company, Inc., C & B Wood Suppliers, Inc., E & F Realty Co., Waterfront Development Co., Inc., EFB Development Co., Inc., Turtle Creek Investment Co., Liquid Oil Growers Organization, Inc., Southwest Agri-Development Specialists, Inc., and Brady R. Justice (collectively the "Original Defendants").[1] The Complaint asserted that these Original Defendants were jointly and severally liable for withdrawal liability under 29 U.S.C. § 1301(b)(1) by virtue of their membership in a controlled group of corporations with Allied Companies, Inc. ("Allied"). The Complaint sought to collect $751,918.80 in withdrawal liability, as well as interest, the greater of interest or liquidated damages, and reasonable attorney's fees and costs. Jurisdiction in the district court was invoked under 28 U.S.C. § 1331 and 29 U.S.C. §§ 1132(e) and 1451(c).

On November 22, 1996, within the 120 days allowed for service under Federal Rule of Civil Procedure 4(m), Central States filed a motion to extend the service period for 45 days. The District Court granted the motion on November 26, 1996, and allowed Central States until January 9, 1997, to effectuate service. On December 20, 1996, Central States filed the First Amended Complaint. The nature of the claim asserted in the First Amended Complaint was the same as in the Complaint. However, numerous parties were added as Defendants, among them EFB Development Company,[2] Sanibel

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[1] Additional parties were named as Defendants in the Complaint but were subsequently dropped from the case in the First Amended Complaint.

[2] Despite the similarity between the names EFB Development Company and EFB Development Co., Inc., the two Defendants are separate as the former is actually a partnership whereas the latter is a

Development Company, Sanibel Investment Company, Turtle Creek of Tennessee, Hato Rey Professional Arts, Inc., Turtle Creek North Apartments, Village Green Apartments, Turtle Creek Apartments of Kokomo, Turtle Creek Apartments of Frankfort, Turtle Creek Apartments of Connersville, Turtle Creek Apartments of Marion, Roxbury Square, Ltd., Turtle Creek of Indiana, EFB Development Company, Sanibel Investment Co.,[3] Wheel Estates, EFB Coal Company, Inc., Horn AG Services, Inc., Table Fresh Grapes, Inc., Arizona Desert Growers, Desert Vineyards, Inc., Red Mountain Products, The Racquets IV Tennis Club, Inc. (collectively the "Amended Defendants").

On February 26, 1997, the Original Defendants filed a motion to vacate the District Court's November 26, 1996, order that granted Central States an extension of time for service of process. Also, on February 26, 1997, the Amended Defendants filed a motion to dismiss contending that the withdrawal liability claim was barred by the statute of limitations.

On September 30, 1997, the District Court granted the Amended Defendants' motion to dismiss and granted the Original Defendants' motion to vacate the District Court's ruling allowing the extension of time for service as to the Original Defendants. App. E at 30a-31a. The District Court indicated that a detailed order setting forth the grounds for the rulings would be forthcoming on or before October 31, 1997. App. E at 30a.

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corporation. Also, there are two separate entities named EFB Development Company. The first, named in both the Complaint and the First Amended Complaint is an Indiana partnership. The second, named in the First Amended Complaint, is a Florida partnership.

[3] There are two entities named Sanibel Investment Co. The first, named in both the Complaint and the First Amended Complaint, is an Indiana partnership. The second, named in the First Amended Complaint, is a Florida partnership.

On October 30, 1997, Central States filed a notice of appeal to protect its rights should the September 30, 1997, ruling be considered a final decision. However, on February 27, 1998, the Seventh Circuit dismissed the appeal due to the lack of a Circuit Rule 50 explanation by the District Court as to the reasons for the dismissal coupled with the absence of the entry of a final judgment under Federal Rule of Civil Procedure 58. App. B at 13a-14a.

After the mandate issued, the District Court allowed the parties to file supplemental memoranda and responses thereto regarding the Court's rulings. Over two years after the case returned to the District Court and the supplemental memoranda were filed, the District Court issued a Memorandum and Order on October 18, 2000, reinstating the original rulings and providing explanation as to the grounds for the District Court's rulings. App. C at 15a-28a. On November 6, 2000, Central States filed a Notice of Appeal.

On June 5, 2001, the Seventh Circuit affirmed the decision of the District Court. App. A at 1a-12a. The Seventh Circuit's decision sets forth the following key relevant facts. In chronological order they are: (1) June 22, 1989—a trio of affiliated corporations (collectively "Allied Grocers") (not the entire controlled group) declared bankruptcy under Chapter 11 of the Bankruptcy Code; (2) May 18, 1990—Central States filed a proof of claim in the bankruptcy in the amount of some $752,000 setting forth an installment schedule; (3) June 2, 1990—Allied ceased *covered* operations triggering a complete withdrawal; (4) June 18, 1990—Allied receives a notice and demand from Central States in the same amount as the proof of claim setting forth a payment schedule of 14 payments with the first payment due on August 1, 1990; and (5) July 31, 1996—Central States files suit against various controlled group members that were not in bankruptcy. App. A at 2a-3a.

Based on these facts, the Seventh Circuit held that the statute of limitations began to run on June 18, 1990, the date Allied received the notice and demand from Central States. App. A at 12a. Respondents never argued that the cause of action accrued on that date. Rather, Respondents argued that the statute began to run on May 18, 1990 (the date the proof of claim was filed) because the filing of a proof of claim allegedly constituted an automatic acceleration of the claim. Second, Respondents argued that even if the proof of claim did not constitute automatic acceleration, Central States' plan treated the bankruptcy filing date of June 22, 1989, as a default. However, the Seventh Circuit rejected both of these arguments finding that the plan language did not amount to a "Doomsday Bomb" requiring acceleration and because the withdrawal had not even occurred at the time the proof of claim was filed. App. A at 8a. Thus, at this point in the analysis, the Seventh Circuit had rejected every argument made by Respondents on appeal regarding the proper date for accrual of the cause of action.[4]

However, instead of finding in favor of Central States, the Seventh Circuit instead held that the cause of action accrued on June 18, 1990, when Central States issued the notice and demand. In reaching this result, the Seventh Circuit took the following steps: (1) The Seventh Circuit states that *Bay Area*

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[4] Notably, the Seventh Circuit did not adopt the reasoning articulated by the district court in support of its opinion, namely, that the statute of limitations accrued with respect to all missed payments on the date the first payment was missed (August 1, 1990). The district court had relied on *Central States, S.E. & S.W. Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993), to support its reasoning without even citing *Bay Area Laundry & Dry Cleaning Pension Trust v. Ferbar Corp.*, 522 U.S. 192, 118 S.Ct. 542 (1997), despite the fact that *Bay Area* had overruled *Navco*. Thus, Central States never received an opportunity to respond to the argument ultimately adopted by the Seventh Circuit because neither Respondents nor the District Court ever made or relied on such an argument.

was limited by its context which did not include bankruptcy. App. A at 4a. As a result, the Seventh Circuit states that because the statute of limitations under MPPAA is to be assimilated to legal principles generally applicable to statute of limitations issues, the doctrine of anticipatory repudiation comes into play. App. A at 4a-6a. (2) After rejecting Respondent's only arguments (relating to the proof of claim), the Seventh Circuit states that complete cessation of operations precipitates a complete withdrawal and therefore "[t]hat was the default." App. A at 9a. (3) The Seventh Circuit states that although a plan cannot accelerate until the employer has a chance to invoke the right to arbitrate (nor during the arbitration itself), "the right to arbitration presupposes that the cause of action has already arisen." App. A at 9a. (4) The Seventh Circuit states that "[t]he Supreme Court made clear in *Bay Area* that the statutory requirement [of having installment payments] does not *prevent* the fund from accelerating all future payments upon default." App. A at 10a-11a (emphasis added). As a result, the Seventh Circuit states that therefore "the only question is whether there was a default." App. A at 11a. (5) The Seventh Circuit states that the "standard rule" in contract law is that the promisee is free to sue on the date of the anticipatory repudiation. App. A at 11a. (6) After noting that "commercial miracles" are possible and that the doctrine of anticipatory repudiation "does not traffic in the miraculous," the Seventh Circuit felt it was "reasonably certain" that Allied would not make the payments due to the cessation of operations. App. A at 12a. Thus, the Seventh Circuit concluded that: (1) there was an anticipatory repudiation on June 18, 1990 (the date of Central States' notice and demand); and (2) that the statute began to run on that date with respect to the entire payment schedule. App. A at 12a. Central States filed a petition for rehearing and petition for rehearing *en banc* that was denied on July 3, 2001. App. D at 29a.

REASONS FOR GRANTING THE WRIT

The Seventh Circuit's decision in this case creates uncertainty as to when a cause of action accrues under MPPAA by contradicting the plain language of both the statute and this Court's decision in *Bay Area*. In *Bay Area*, this Court made it clear that a cause of action under MPPAA does not accrue until a payment is missed. Further, this Court made it clear that there was no acceleration of the withdrawal liability obligation unless the pension plan gave clear notice of its intent to accelerate.

Here, the Seventh Circuit applied the doctrine of anticipatory repudiation to hold that the cause of action accrued with respect to the entire payment schedule before the first payment was even due. In doing so, the Seventh Circuit brought through the back door its *Navco* decision that was overruled in *Bay Area*.[5]

Further, the Seventh Circuit failed to recognize that this Court has stated that the doctrine of anticipatory repudiation generally has no application to unilateral contracts, and particularly no application to contracts for the payment of money. *Smyth v. United States*, 302 U.S. 329, 356, 58 S.Ct. 248, 253 (1937). In addition, even when the doctrine applies, the cause of action accrues at the normal time for performance unless the obligee elects to sue earlier asserting an anticipatory breach. *Franconia Assocs. v. United States*, 240 F.3d 1358, 1363-64 (Fed. Cir. 2001).

The clarity provided by this Court's decision in *Bay Area* has been replaced by the uncertainty of the misapplication of a doctrine that does not even apply in this context. This Court should grant the petition for a writ of certiorari to ensure that the uniformity and clarity in this area provided in *Bay Area* is not undermined.

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[5] Interestingly, two of the three judges that decided this case, namely, Judges Bauer and Coffey, were on the panel that decided the *Navco* case.

I. BACKGROUND OF MPPAA AND ITS DEFAULT AND ACCELERATION PROVISIONS

Congress enacted ERISA in 1974 to provide comprehensive regulation for private pension plans. *Connolly v. PBGC*, 475 U.S. 211, 214, 106 S.Ct. 1018, 1020 (1986). As part of ERISA, Congress established the Pension Benefit Guaranty Corporation ("PBGC") to protect the pensions of workers who were participants in failed pension funds. *Id.* However, ERISA did not obligate the PBGC to guarantee payments with respect to multiemployer plans until January 1, 1978. *Id.* During this interim period, Congress became concerned with the debilitating effect that employer withdrawals have on multiemployer plans. *Id.* at 215, 106 S.Ct. at 1021; *see generally PBGC v. R.A. Gray & Co.*, 467 U.S. 717, 720-25, 104 S.Ct. 2709, 2713-15 (1984); *Peick v. PBGC*, 724 F.2d 1247, 1251-56 (7th Cir. 1983). The withdrawal of an employer can have a domino effect on a multiemployer plan because the withdrawal of one employer increases the burden on the other employers in the plan in turn leading those other employers to fail. *Connolly*, 475 U.S. at 215, 106 S.Ct. at 1021; *Santa Fe Pacific Corp. v. Central States, S.E. & S.W. Areas Pension Fund*, 22 F.3d 725, 726-27 (7th Cir. 1994). Furthermore, employers fearing this domino effect might attempt to withdraw from a multiemployer fund because of a perception of rising obligations. Of course, such perceptions become reality because the withdrawal of that employer sets off the very domino effect that the withholding employer hoped to avoid. *Id.*; *Artistic Carton Co. v. Paper Indus. Union-Management Pension Fund*, 971 F.2d 1346, 1348 (7th Cir. 1992) ("[A] series of withdrawals, much like a bank run, can leave the fund unable to pay off vested obligations.") This, in turn, leads to increased taxpayer expense because the PBGC must then cover the shortfall. *See Trustees of the Chicago Truck Drivers Union (Indep.) Pension Fund v. Leaseway Transp. Corp.*, 76 F.3d 824, 827 (7th Cir. 1996). In addition, the

insurance for pension plans is far from complete, and pensioners may ultimately be at risk of losing a substantial portion of their pensions even with the insurance provided by the PBGC.

As a result, Congress enacted MPPAA. MPPAA, like most other provisions of ERISA, is intended to avoid the "great personal tragedy" that occurs when pension expectations are frustrated. *Central States, S.E. & S.W. Areas Pension Fund v. Johnson*, 991 F.2d 387, 392 (7th Cir. 1993). MPPAA imposes withdrawal liability on an employer withdrawing from a multiemployer pension plan which is measured as the employer's proportionate share of the plan's unfounded vested benefits, *i.e.*, the difference between the present value of the vested benefits and the current value of the plan's assets. *Connolly*, 475 U.S. at 217, 106 S.Ct. at 1022; 29 U.S.C. §§ 1381, 1391; *see generally Milwaukee Brewery Workers' Pension Fund v. Jos. Schlitz Brewing Co.*, 513 U.S. 414, 115 S.Ct. 981 (1995) (discussing details of withdrawal liability calculation). An employer completely withdraws from a plan when it "permanently ceases to have an obligation to contribute under the plan" or when it "permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a); *Central States, S.E. & S.W. Areas Pension Fund v. Sherwin-Williams Co.*, 71 F.3d 1338, 1339 (7th Cir. 1995). Upon withdrawal, MPPAA provides a detailed dispute resolution procedure. *See Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 196-97, 118 S.Ct. 542, 547 (1997) (discussing details of dispute resolution process); *Concrete Pipe & Prods of Cal., Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 113 S.Ct. 2264 (1993) (discussing burden of proof and standard of review in arbitration proceeding).

To collect withdrawal liability, a plan must first "determine the amount of withdrawal liability owed by a withdrawing employer." 29 U.S.C. §§ 1382, 1391; *Central States, S.E. &*

S.W. Areas Pension Fund v. Bell Transit Co., 22 F.3d 706, 707 (7th Cir. 1994). The plan must then send the employer a notice and demand for payment. 29 U.S.C. § 1390(b)(1); *Bell Transit*, 22 F.3d at 707. The employer may ask the plan to review its assessment under 29 U.S.C. § 1399(b)(2); *Bell Transit*, 22 F.3d at 707. If dissatisfied with the review, the employer may initiate arbitration. 29 U.S.C. § 1401(a)(1); *Bell Transit*, 22 F.3d at 707.

If the employer fails to initiate arbitration, the assessment becomes due and owing and the plan may sue to collect it. 29 U.S.C. § 1401(a)(1); *Bell Transit*, 22 F.3d at 707. However, even if the employer initiates arbitration, the employer must continue to pay in accordance with the schedule of payments. *Bell Transit*, 22 F.3d at 707. The requirement that the employer make interim payments (interim in the sense that they are due between the time a fund sends out the notice and demand and the final determination of liability) sets up a "pay now, dispute later" scheme. *Central States, S.E. & S.W. Areas Pension Fund v. Wintz Properties, Inc.*, 155 F.3d 868, 876 (7th Cir. 1998).

Reinforcing the protection afforded to pension funds is Section 4001(b)(1) of ERISA, 29 U.S.C. § 1301(b)(1). Under this section, all trades or businesses under common control are treated as a single employer for purposes of assessing and collecting withdrawal liability. *Central States, S.E. & S.W. Areas Pension Fund v. Ditello*, 974 F.2d 887, 889-90 (7th Cir. 1992). As a result, all trades or businesses under common control are jointly and severally liable for withdrawal liability. *Johnson*, 991 F.2d at 388. One of the purposes of this section is to prevent a business subject to withdrawal liability from "fractionalizing its operations" or shifting assets to avoid its obligations to a pension plan. *Id.*

Under MPPAA, an action may not be brought more than six years after the date on which the cause of action arose. 29 U.S.C. § 1451(f)(1). Because MPPAA requires a payment

schedule, questions arise as to when a cause of action accrues for a missed payment. Questions also arise regarding the effect of a missed payment on the accrual of the statute of limitations for payments due subsequent to the missed payment. MPPAA contains the following provision impacting these questions:

> (5) In the event of a default, a plan sponsor *may* require immediate payment of the outstanding amount of an employer's withdrawal liability, plus accrued interest on the total outstanding liability from the due date of the first payment which was not timely made. For purposes of this section, the term "*default*" means—
>
> (A) the failure of an employer to make, when due, any payment under this section, if the failure is not cured within 60 days after the employer receives written notification from the plan sponsor of such failure, and
>
> (B) any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability.

29 U.S.C. § 1399(c)(5) (emphases added). Thus, under this statute, two distinct events are required before the entire amount of withdrawal liability assessment becomes immediately due: (1) a default as defined in the statute; and (2) the affirmative exercise of the plan's discretion to accelerate.

II. *BAY AREA* HOLDS THAT A CAUSE OF ACTION ACCRUES UNDER MPPAA WHEN EACH PAYMENT IS MISSED

In *Bay Area Laundry & Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192, 118 S. Ct. 542 (1997), this Court construed MPPAA in determining when a cause of action accrues. In that case, the Ninth Circuit held that the cause of action accrued on the date of withdrawal. This Court

rejected that position and held that "the statute does not begin to run on withdrawal liability until a scheduled payment is missed." *Id.* at 195, 118 S. Ct. at 546. This Court based its holding on the fact that "MPPAA affords a plan no basis to obtain relief from an employer on that date [of withdrawal]." *Id.* at 201, 118 S. Ct. at 549. Rather, "withdrawal 'merely sets in motion the usual (and routine) process of calculation, notification, schedule, possible request for review or arbitration, and payment.'" *Id.* at 201-02, 118 S. Ct. at 549 (quoting *Joyce v. Clyde Sandoz Masonry*, 871 F.2d 1119, 1124 (D.C. Cir. 1989)).

This Court went on to resolve a question that had split the Seventh Circuit from the Third Circuit, namely, whether the statute of limitations begins to run with respect to the entire payment schedule when the first payment is missed (as the Seventh Circuit had held), or whether each missed payment creates a separate cause of action with its own six-year limitations period (as the Third Circuit had held). *Compare Central States, S.E. & S.W. Areas Pension Fund v. Navco*, 3 F.3d 167 (7th Cir. 1993) *with Board of Trustees of Dist. No. 15 Machinists' Pension Fund v. Kahle Engineering Corp.*, 43 F.3d 852 (3rd Cir. 1994). This Court (following the Third Circuit's *Kahle* decision and rejecting the Seventh Circuit's *Navco* decision) held that each missed payment creates a separate cause of action with its own six-year limitations period. *Bay Area*, 522 U.S. at 206-10, 118 S. Ct. at 551-53.

In reaching this holding, this Court noted that "[j]ust as a pension plan cannot sue to recover *any* withdrawal liability until the employer misses a scheduled payment, so too must the plan generally wait until the employer misses a particular payment before suing to collect *that payment*." *Id.* at 208, 118 S. Ct. at 552. Further, in a passage that has great bearing on the instant case, this Court stated:

> The general rule [that each missed payment creates a separate cause of action with its own limitations period]

> applies even though a plan has the *option* to accelerate and collect the entire debt if the employer defaults. See 29 U.S.C. § 1399(c)(5). For limitations purposes, we cannot assume that a default will or should invariably lead to acceleration, for the statutory acceleration provision is by its terms permissive. See *ibid.* ("In the event of a default, a plan sponsor *may* require immediate payment . . . .") (emphasis added [in original]). Trustees confronting a delinquent employer may accelerate if they decide such a course is in the best interests of the plan, but they need not do so to preserve the plan's right to recover future payments. Cf. *Kahle Engineering Corp.*, 43 F.3d, at 859, and n. 7 (describing reasons why acceleration might not be in the plan's best interests). This, again, is the rule that generally applies to installment obligations. If the creditor refrains from exercising the acceleration option, the limitations period on a particular payment runs from the date that payment becomes due.

Bay Area, 522 U.S. at 208-09, 118 S. Ct. at 552 (emphasis added). Following this passage, the Court remarked that "[l]ike the typical installment creditor, the plan has no right, absent default *and acceleration*, to sue to collect payments before they are due, *and it has no obligation to accelerate on default*." *Id.* at 210, 118 S. Ct. at 553 (emphases added).

III. *BAY AREA* APPLIES IN THE BANKRUPTCY CONTEXT

The Seventh Circuit distinguished *Bay Area* because it was not decided in the bankruptcy context. However, the statutory language and *Bay Area* itself make it clear that this is a distinction without a difference. As stated earlier, the statute provides that a plan *may* accelerate in the event of a default. 29 U.S.C. § 1399(c)(5). However, the statute does not *require* acceleration and indeed *Bay Area* makes it clear that

the mere *right* to accelerate, as opposed to the actual decision to accelerate, does not cause the statute of limitations to accrue on future payments. *See Bay Area*, 522 U.S. at 208-09, 118 S. Ct. at 552 ("The general rule [that each missed payment creates a separate cause of action with its own limitations period] applies even though a plan has the option to accelerate and collect the entire debt if the employer defaults.") Thus, the mere fact that a default occurs does not require acceleration and does not start the statute of limitations running. If it did, then the statute would have run as to all missed payments in *Bay Area* because once the employer missed the first payment, it was in default, and the plan had the *right* to accelerate.

The *reason* for the default (for example, the shutdown of operations) is also not determinative of when the statute runs. As this Court stated, "the statutory acceleration provision is by its terms permissive." *Id.* Further, this Court noted that it is up to the plan to decide to accelerate but that the plan "need not do so to preserve the plan's right to recover future payments." *Id.* Also, this Court reasoned that such a holding is consistent with the general rule that a creditor may refrain from exercising the acceleration option and under those circumstances the statute runs from the date of each missed payment. *Id.* This Court's holding that the cause of action does not accrue absent acceleration is conditioned neither on the cause of the default nor on the *reason* why the plan chooses not to accelerate. Indeed, the ~~statutory~~ provision providing that the plan may accelerate applies not just to the section that makes missing a payment a default, but applies equally to the provision that makes "any other event defined in rules adopted by the plan which indicates a substantial likelihood that an employer will be unable to pay its withdrawal liability" a default. *See* 29 U.S.C. § 1399(c)(5).

The circumstances that the Seventh Circuit envisions would create anticipatory repudiation are precisely those

situations that "indicate[] a substantial likelihood that an employer will be unable to pay its withdrawal liability." 29 U.S.C. § 1399(c)(5). Under the statute and under *Bay Area*, the *permissive* nature of acceleration applies not just to a situation where an employer misses a payment, but also to any other situation constituting a default. The *reason* for a default, whether it be a missed payment, a bankruptcy filing, or the shutdown of the employer, makes no difference under the language of the statute.

As a result, the Seventh Circuit is incorrect in stating that *Bay Area* does not apply merely because *Bay Area* does not "suggest that the only way in which the payor in a contract can default is by failing to pay when payment becomes due." App. A at 4a. The statute defines the term default. It defines a default as either a missed payment or any other event defined under the plan as a default (notably leaving the decision as to what constitutes a default to the plan). It also defines the consequences of a default, namely, that a plan *may*, but is not required to, accelerate. To hold that the doctrine of anticipatory repudiation constitutes another instance of default when the statute specifically defines default therefore conflicts with the statute. Further, to hold that the *consequences* of default through anticipatory repudiation (*i.e.*, that the cause of action for the entire payment schedule accrues) are different than the consequences that are defined in the statute for a default (*i.e.*, that the plan *may*, but need not, accelerate, and if it does not, the cause of action accrues separately from the date of each missed payment) conflicts with the statute.[6]

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[6] Nor does the fact that the panel states that this Court in *Bay Area* "assimilate[d] statute of limitations issues under the Multiemployer Pension Plan Amendments Act to the legal principles generally applicable to statutes of limitations issues", App. A at 4a, change the result. In *Bay Area*, this Court examined the general rule to supplement its reading of the statute. This Court rejected the Seventh Circuit's holding in *Navco*

IV. NEITHER A WITHDRAWAL NOR A CESSATION OF OPERATIONS CONSTITUTES A DEFAULT

The Seventh Circuit also held that the "[c]omplete cessation of operations" caused a withdrawal and therefore constituted a default. App. A at 9a. This holding cannot be squared with the statutory language or *Bay Area*. As *Bay Area* holds, a mere withdrawal does not cause the cause of action to accrue because the plan does not have a cause of action until the employer misses a payment. *Id.* at 201, 118 S. Ct. at 549. Perhaps the Seventh Circuit meant that it was the cessation of operations that caused a default. However, this cannot be true because that would put an employer that withdraws as the result of a cessation of operations in an automatic default merely for withdrawing.

Indeed, the statutory language defines a complete withdrawal as, among other things, the cessation of all *covered* operations, not the cessation of all operations. *See* 29 U.S.C. § 1383(a)(2). That is, what triggers a complete withdrawal is the employer ceasing to do that part of its business for which it had employees that participated in the plan. So it is simply incorrect to assume that an employer that ceases *covered* operations will not be able to pay withdrawal liability (and thus anticipatory repudiation occurs) because substantially all of its non-covered operations may still be (and often are) ongoing.

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that the language of the statute required a result different from the general rule. Here, the statute defines both default and the consequences of default (*i.e.*, permissive acceleration). The statute itself provides the answer as to what constitutes default and the consequences that flow from default. It is thus contrary to the statutory language to include a new ground of default and a different consequence of default (automatic acceleration). Nothing in *Bay Area* suggests that a general rule regarding anticipatory repudiation may be applied in derogation of the statutory text.

V. THE RIGHT TO ARBITRATION PREVENTS ACCELERATION

The Seventh Circuit's statement that "the right to arbitration presupposes that the cause of action has already arisen", App. A at 9a, is contrary to the statute and *Bay Area*. In *Bay Area*, this Court rejected this position and held that "the statute does not begin to run on withdrawal liability until a scheduled payment is missed." *Id.* at 195, 118 S. Ct. at 546. Instead, "withdrawal 'merely sets in motion the usual (and routine) process of calculation, notification, schedule, possible request for review or arbitration, and payment.'" *Id.* at 201-02, 118 S. Ct. at 549 (quoting *Joyce*, 871 F.2d at 1124). It is the routine issuance of the notice and demand that starts the clock running for a request for review and arbitration. *See* 29 U.S.C. §§ 1399(b) and 1401(a). An employer may request review and arbitration while paying according to the schedule. Indeed, MPPAA requires such payments notwithstanding a request for review or arbitration under its "pay now, dispute later" scheme. *See, e.g., Wintz Properties*, 155 F.3d at 876. Thus, the employer's right to arbitration in no way indicates that a cause of action has accrued. For example, assume that the employer makes all payments according to schedule (as should be done) while arbitration is ongoing. A cause of action has not accrued because the employer has not missed a payment.

The Seventh Circuit acknowledged that in *Chicago Truck Drivers Union Pension Fund v. Century Motor Freight, Inc.*, 125 F.3d 526, 533-34 (7th Cir. 1997), the Seventh Circuit itself held that a plan may not accelerate the payment schedule while arbitration is pending. It is not that the employer does not have a "duty to pay" or that the right to payment is "suspended," as the Seventh Circuit stated. App. A at 9a. Rather, a plan may not *accelerate* during this period. As stated above, the mere fact that arbitration is ongoing does not mean that a cause of action has accrued.

For a cause of action to accrue, the employer must miss a payment. Further, as *Bay Area* holds, missing a payment means that the statute begins to run with respect to *that particular payment*, not the entire schedule. Because acceleration is precluded under the statute and the Seventh Circuit's own *Century Motor Freight* decision, it cannot be said that the cause of action for the whole schedule accrues on the date that the first payment is missed.

An example highlights this fact. As the Seventh Circuit notes, a payment schedule under MPPAA can last for up to 20 years. App. A at 12a. Assume that the employer initiates arbitration and that it misses the first payment under a schedule lasting 20 years. Because arbitration is pending, the plan cannot accelerate the payment schedule. Yet under the Seventh Circuit's reasoning, the cause of action has accrued, and thus the statute is running, with respect to the whole payment schedule. Assume further that the arbitration proceeding lasts seven years. By now, under the Seventh Circuit's reasoning, the statute has run with respect to the whole schedule (even with respect to payments that were due well into the future but could not be accelerated due to the arbitration). Under this reasoning, the statute has run on the whole schedule even though the plan *never had the right* to sue to get the payments (because the plan could not accelerate) that were not due until the future (*i.e.*, the payments that were due more than six years after the first payment was due). Without the right to sue for those payments, it cannot be said that the cause of action for those payments has accrued.

VI. BOTH THE STATUTE AND *BAY AREA* MAKE DEFAULT DISTINCT FROM ACCELERATION

The Seventh Circuit's proposition that the plan has the right to accelerate and that therefore the only question is whether there is a default is contrary to the statutory language

and *Bay Area*. Default is a *sine qua non* for acceleration. However, as *Bay Area* makes clear, default only gives the plan the *right* to accelerate; default is a necessary, but not sufficient, condition for acceleration. In the absence of acceleration, the cause of action accrues separately from the date of each missed payment. 522 U.S. at 208-09, 118 S. Ct. at 552. The Seventh Circuit incorrectly conflates default with acceleration. However, "[l]ike the typical installment creditor, the plan has no right, absent default *and acceleration*, to sue to collect payments before they are due, *and it has no obligation to accelerate on default.*" *Id.* at 210, 118 S. Ct. at 553 (emphases added). The Seventh Circuit never states that Central States exercised its *right* to accelerate. Rather, all it found is that a default occurred. But a default standing alone (regardless of the reason for the default) is not enough for the cause of action to accrue. Indeed, the Seventh Circuit recognized that Central States "demanded payment on the installment plan." App. A at 10a. The question is not, as the Seventh Circuit believed, whether Central States thought a default occurred, but rather whether Central States exercised the acceleration option. However, issuing the notice and demand with an installment schedule shows that acceleration was not intended. Otherwise, it would be impossible to distinguish exercise of the acceleration option from demand for payment in installments since the panel would need to equate the two for the notice and demand in this case to be treated as acceleration.

VII. THE STATUTE DID NOT BEGIN TO RUN ON THE DATE OF THE ANTICIPATORY REPUDIATION

The Seventh Circuit's holding that the statute began to run with respect to the entire payment schedule because the "standard rule" is that the promisee may immediately sue once anticipatory repudiation occurs is contrary to the statutory language, *Bay Area*, and indeed the general rule

regarding anticipatory repudiation. First, as argued above, to the extent the doctrine of anticipatory repudiation has any role to play under the statute, it is covered under 29 U.S.C. § 1399(c)(5)(B). However, under this section, acceleration is still permissive. It is contrary to both the statute and *Bay Area* (which holds that the mere right to acceleration does not make the cause of action accrue with respect to the entire payment schedule) to hold that the cause of action accrues with respect to the whole payment schedule merely because of the *right* to acceleration as opposed to acceleration itself.

Second, the Seventh Circuit is incorrect in holding that Central States had not completely performed its side of the "contract" because it is still obligated to pay pensions. App. A at 6a. By doing so, the Seventh Circuit attempts to avoid the exception to the anticipatory repudiation doctrine that makes it inapplicable when one party has completely performed its side of the contract. *See Smyth v. United States*, 302 U.S. 329, 356, 58 S.Ct. 248, 253 (1937) (doctrine of anticipatory breach has in general no application to unilateral contracts); *New York Life Ins. Co. v. Vislas*, 297 U.S. 672, 680, 56 S.Ct. 615, 619 (1936) (party that no longer has obligation to perform may be compelled to wait for installments as they mature). Withdrawal liability is imposed by statute and does not depend upon an agreement between a plan and the employer to pay withdrawal liability. Additionally, a plan must provide the pensions even if the employer never withdraws from the plan, withdraws from the plan and owes no withdrawal liability, or withdraws from the plan and fails to pay withdrawal liability. There is no linkage or interdependence—by contract, by statute or otherwise—between the employer's obligation to pay withdrawal liability and the plan's obligation to pay pensions. Thus, it cannot be said that "performance" by a plan is contingent upon payment of withdrawal liability. Indeed, payment of the pensions is not even contingent upon payment of the contributions that are to

fund the pensions. *See, e.g., Central States, S.E. & S.W. Areas Pension Fund v. Gerber Truck Serv., Inc.*, 870 F.2d 1148, 1153 (7th Cir. 1989) (*en banc*).

Nor does the Seventh Circuit's decision recognize that the doctrine of anticipatory repudiation has no application to the payment of money only. *Smyth*, 302 U.S. at 356, 58 S.Ct. at 253; *Roehm v. Horst*, 178 U.S. 118, 20 S.Ct. 780, 787 (1900) (court notes that money contracts stand on different footing from other contracts for purposes of the anticipatory repudiation doctrine). The Seventh Circuit noted that acceleration clauses "are inserted to fill a hole in the law of contracts" that would be unnecessary "if not for the rule carving out the completed-performance case from the operation of the doctrine of anticipatory repudiation." App. A at 6a. The Seventh Circuit apparently believed that it was patching this "hole" in the law of contracts by disregarding the completed performance rule. However, the statute itself provides for acceleration at the option of the plan. Thus, there is no gap to fill. Instead, the Seventh Circuit's holding merely strips away the discretionary nature of acceleration. Further, the doctrine simply has no role to play in this context because the doctrine was developed to prevent the circumstance where the non-breaching party would be forced to perform under a contract even though the other party gave notice of an intention to breach. Here, there is no additional performance required by the pension plan.

Even under the doctrine of anticipatory repudiation, the payee has the choice of suing at the time of the anticipatory repudiation or waiting until the time of performance and then suing. If the party chooses to wait until the time of performance, the statute of limitations does not begin to run until the *time of performance*, not the time of the *anticipatory repudiation*. *See, e.g., Franconia Assocs. v. United States*, 240 F.3d 1358, 1363-65 (Fed. Cir. 2001) ("the normal rule is that the statute of limitations begins to run from the date of

performance specified in the contract unless the obligee elects to sue earlier for anticipatory repudiation"); *Penn-Ohio Steel Corp. v. United States*, 354 F.2d 254, 272 n.35 (Ct. Cl. 1965) ("the majority of courts in this country hold that the statute of limitations begins to run on the date specified in the contract for performance unless the injured party elects to sue prior to that date for the anticipatory breach"); *White v. Prenzler*, 131 N.E.2d 540, 543 (Ill. 1956) (citing Restatement (First) of Contracts § 322) (same).

The general rule that the payee has the right to wait until the time of performance to sue and that the statute of limitations does not run in the interim is entirely consistent with the statutory language and *Bay Area* because both leave it to the plan (the payee) to decide whether to accelerate. Under the statute and *Bay Area*, the mere *right* to accelerate does not cause the statute to run as to the entire payment schedule. Similarly, under the doctrine of anticipatory repudiation, the mere *right* to declare an anticipatory repudiation does not cause the statute to run. To the extent that the doctrine of anticipatory repudiation has any role to play in this context, it must be applied in a manner consistent with the statute and *Bay Area*. The general rule is consistent with both. The Seventh Circuit's rule is contrary to both, and converts a doctrine that was intended to protect a payee into a trap for the unwary.[7]

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[7] Even assuming that the language of Section 1399(c)(5) (and its construction by this Court in *Bay Area*) does not foreclose the use of the doctrine of anticipatory repudiation, it is certain that the doctrine may not contradict the statute, and to the extent that Congress would desire the Court to supplement the statute with the doctrine, we must assume that Congress wants the Court to apply the doctrine consistent with the general rule in the absence of indicia to the contrary. If anything, the language of Section 1399(c)(5) indicates that applying the doctrine contrary to the general rule would be contrary to the statute itself.

VIII. ALLIED'S INABILITY TO PAY DOES NOT CONSTITUTE REPUDIATION BECAUSE ALL TRADES OR BUSINESSES UNDER COMMON CONTROL ARE JOINTLY AND SEVERALLY LIABLE FOR PAYMENT

Finally, even if the doctrine of anticipatory repudiation applies in exactly the manner stated by the Seventh Circuit, the Seventh Circuit need not rely on "commercial miracles" nor "traffic in the miraculous", App. A at 12a, to find that the conditions for anticipatory repudiation were *not* satisfied in this case. MPPAA makes the "employer", which is defined as *all* trades or businesses under common control, jointly and severally liable for withdrawal liability payments. App. A at 3a; 29 U.S.C. § 1301(b)(1). As consistently held by the various courts of appeals, notice to one controlled group member is notice to all. *See, e.g., Central States, S.E. & S.W. Areas Pension Fund v. Slotky*, 956 F.2d 1369, 1375 (7th Cir. 1992). Even if it can be assumed as a matter of law that due to its cessation of operations in bankruptcy *Allied* could not make the payments, it cannot be assumed as a matter of law that *none* of the members of the controlled group could make the payments. Indeed, this case was filed to collect the withdrawal liability payments from numerous defendants who are alleged to be in the controlled group, *none* of whom were in the Allied bankruptcy. Thus, even if it was established that Allied could not make the withdrawal liability payments, it was not (and cannot be) established that the "employer" (consisting of *all* trades or businesses under common control) could not pay. Therefore, it has not been established as a matter of law that an anticipatory repudiation occurred because other members of the controlled group do have the ability to pay.

CONCLUSION

The Seventh Circuit's application of the doctrine of anticipatory repudiation in this context is contrary to both the statutory language and *Bay Area*. The clarity brought by *Bay Area* to the statute of limitations analysis under MPPAA has been lost. Under the Seventh Circuit's holding, pension plans and employer's will end up litigating a hopeless morass of questions related to the doctrine of anticipatory repudiation. Anticipatory repudiation is common law contract doctrine completely foreign to the carefully crafted statutory scheme for determining when a cause of action for withdrawal liability accrues, and the statute of limitations begins to run. Further, even if the doctrine applies, it does not make a cause of action accrue earlier than the time for performance (or require acceleration) in the absence of an election by the payee. Just as the statute leaves acceleration to the discretion of the plan (leaving the doctrine of anticipatory repudiation no role to play), the doctrine of anticipatory repudiation leaves it to the plan (the payee) whether to await performance or to sue based upon the anticipatory repudiation. The Seventh Circuit's holding strips a plan of the discretion conferred by the statute and creates uncertainty as to when the cause of action accrues. For these reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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